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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| JOSHUA MORGAN et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>AT&T WIRELESS SERVICES, INC.,<br><br>Defendant and Respondent. | B241242<br><br>(Los Angeles County<br>Super. Ct. No. BC318474) |

APPEAL from an order of the Superior Court of Los Angeles County, Jane Johnson, Judge. Reversed and remanded.

Kirtland & Packard, Behram V. Parekh, and Joshua A. Fields for Plaintiffs and Appellants.

John C. O'Malley; Mayer Brown, Donald M. Falk, and John Nadolenco for Defendant and Respondent.

## INTRODUCTION

Plaintiffs Joshua Morgan and George Shannon appeal from the trial court's denial of their motion to certify a class consisting of customers who purchased cellular telephones from defendant AT&T Wireless Services, Inc. (the predecessor to AT&T Mobility, hereafter referred to as ATTM) in 2003. Plaintiffs' filed a class action lawsuit alleging ATTM made changes to their wireless network which rendered plaintiffs' phones unusable. ATTM initially sought to compel individual arbitration based on an arbitration clause that contained a clear action waiver, but changes in the law resulted first in its abandonment of that request, and later in its renewal of its request to compel individual arbitration. The trial court concluded that ATTM waited too long to renew its request to compel arbitration and waived that right as to the named plaintiffs. However, the court also held that ATTM could not have sought to compel arbitration as to the putative class members before the named plaintiffs filed a motion seeking class certification. When plaintiffs did so, the court denied the motion for class certification on the basis that plaintiffs were not compelled to arbitrate due to ATTM's waiver, but the putative class members were still subject to arbitration. As a result, the named plaintiffs were not representative of the class, and the trial court therefore denied the motion for class certification.

Plaintiffs contend on appeal that a finding of waiver of the right to compel arbitration by a class action defendant applies not only to claims of the class representatives, but also to putative class members, prior to class certification. Because we agree, we reverse the trial court's order denying class certification.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Initiation of the Lawsuit

A now-dismissed plaintiff filed the original complaint in this action in July 2004. Morgan and Shannon joined as named plaintiffs in December 2004. The essential factual

underpinning of the complaint was that in 2003 plaintiffs purchased Sony Ericsson T68i phones for use on ATTM's wireless network and subsequently ATTM made changes to the network that rendered those phones essentially unusable. ATTM provided free replacement phones but they were inadequate. Plaintiffs pleaded violations of various consumer protection laws. The operative third amended complaint was filed in May 2007.

## II. ATTM's 2005 Motion to Compel Arbitration

The ATTM wireless service contracts signed by the plaintiffs included a provision requiring that any disputes between the parties were to be resolved by binding arbitration. A further provision stated that "[y]ou and we both agree that any arbitration will be conducted on an individual basis and not on a consolidated, classwide or representative basis."[1]

ATTM invoked the arbitration provision in mid-2005 and sought to compel arbitration. The trial court (Chaney, J.) denied the motion in October 2005. The trial court had before it both ATTM's motion to compel arbitration and plaintiffs' cross-motion to compel classwide arbitration. The court initially indicated its tentative ruling was to grant ATTM's motion to compel, but indicated that the provision in the agreement waiving classwide arbitration was unenforceable, relying on the recently-decided case of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), which held that class action waivers in consumer contracts of adhesion were unconscionable under some circumstances. ATTM responded that if its class waiver provision might be unenforceable it would prefer not to proceed to arbitration. The trial court therefore

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[1] ATTM states in its brief on appeal that it has periodically revised its arbitration provision and permits customers and former customers to apply the revised provisions rather than the terms in their original agreements; ATTM characterizes the revised provisions as more consumer-friendly. Plaintiffs assert, on the other hand, that the applicable agreement is the one packaged with the T68i phone, the terms of which are stated here.

found that neither party wished to pursue arbitration (as plaintiffs' filing of a lawsuit was inconsistent with arbitration), and denied the motions to compel arbitration.

ATTM filed a notice of appeal from the denial of its motion to compel arbitration but dismissed the appeal in June 2006 after other cases following *Discover Bank* made it clear an appeal would be futile.

## III. The Answer to the Third Amended Complaint, the Successful Demurrer, and the Appeal

Eventually, ATTM filed a demurrer to the third amended complaint which the trial court sustained without leave to amend, dismissing the action. Plaintiffs appealed and the ruling was affirmed in part and reversed in part by this court in *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235 (*Morgan I*). We found plaintiffs had stated claims for violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200), violation of the California Consumers Legal Remedies Act (Civ. Code, § 1750), and for fraud and deceit. We held plaintiffs lacked standing on their claim under the False Advertising Law (Bus. & Prof. Code, § 17500), and had abandoned their declaratory relief claim. (*Morgan I*, at pp. 1259, 1262-1263.)

## IV. The Renewed Motion to Compel Arbitration and the Motion to Certify the Class

ATTM filed an answer to the third amended complaint on April 1, 2011. Later that month, on April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*Concepcion*), in which the high court held that California's *Discover Bank* rule—classifying most collective-arbitration waivers in consumer contracts as unconscionable—is preempted by the Federal Arbitration Act because it interferes with fundamental attributes of arbitration. (*Id.* at p. 1753.)

In September 2011, plaintiffs moved for class certification. The parties undertook significant class certification-related discovery. ATTM took depositions, participated in

status conferences, and sought approval to set the depositions of numerous absent class members.

On November 8, 2011, about six and one-half months after *Concepcion* was decided, ATTM filed a renewed motion to compel arbitration (based on the assumption, in light of *Concepcion*, that arbitration would occur on an individual basis).

The trial court issued a tentative ruling indicating it was likely to deny ATTM's renewed motion to compel arbitration on the ground ATTM waited too long after *Concepcion* was decided and in the meantime had undertaken discovery, thus waiving its right to compel arbitration. However, the trial court permitted ATTM to file preliminary opposition to the motion for class certification. The only issue it was permitted to address was whether the putative class members' arbitration agreements precluded certification of a class. ATTM filed its preliminary opposition in February 2012.

On March 15, 2012, the trial court denied the motion for class certification, concluding that although ATTM had waived its right to compel arbitration of the named plaintiffs' claims, that waiver did not extend to the claims of the absent members of the putative class. Relying on *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363 (*Sky Sports*), the trial court ruled that ATTM could not have moved to compel arbitration of the putative class members' claims "before the issue of class certification was before the court." The court stated: "While [plaintiffs] seek[] to distinguish Sky Sports on the basis that [ATTM] could have moved to compel arbitration as to the entire class because the 'named plaintiffs and the putative class members here are all subject to the same arbitration agreement' (unlike the named plaintiff in Sky Sports who did not sign the arbitration agreement), this is a distinction without a difference. Sky Sports stands for the proposition that it is premature to bring a motion to compel arbitration as to the putative class members unless and until a class certification motion is filed, and the failure to bring one before then cannot constitute a waiver, including any claim based on the statute of limitations. Delay as to the putative class can only happen after certification."

The court continued: "It is true that [defendant] could have timely brought a motion to compel arbitration as to the class representative following Concepcion. However, that fact has little bearing on the timing of a motion with respect to putative class members. Until the filing of the motion for class certification in this case, the issues as to the enforcement of putative class members' arbitration agreements and resulting individualized issues affecting commonality, as well as lack of typicality as to the class representatives, were not ripe for decision."

The court noted that ATTM had not pleaded arbitration as an affirmative defense in its answer to the third amended complaint. In the court's view, however, no other factors supported a finding that ATTM had waived its right to require "the remaining putative class members" to abide by their arbitration agreements.

The court also found that both named plaintiffs, as the would-be class representatives, had not met their burden to establish they are typical of a class consisting almost entirely of people who had agreed to arbitrate. The court stated that "class certification is improper in light of the existence of arbitration agreements applicable to each putative class member who was a customer of [ATTM], as opposed to class representatives no longer subject to arbitration due to waiver by delay in bringing a motion to compel arbitration. Because the lack of typicality of class representatives and the individualized issues as to enforceability and terms of a variety of potential arbitration agreements as to putative class members, the Court concludes a class cannot be certified and denies plaintiffs' motion for class certification."

This timely appeal followed.

## DISCUSSION

Plaintiffs contend that none of the absent members of the putative class are required to arbitrate this matter because ATTM waived its right to compel arbitration as to plaintiffs as well as to all members of the putative class; ATTM did not have to await filing of a motion for class certification to move to compel arbitration as to putative class

members. Thus, the trial court erred in denying plaintiffs' motion for class certification on the basis that the named plaintiffs are not typical of the class they sought to represent. We agree.

## I. The Finding of Waiver Is Now Irrefutable

The trial court concluded that ATTM waived its right to compel arbitration as to the named plaintiffs because it delayed for over six months after *Concepcion* was decided and engaged in class-related discovery, before filing a renewed motion to compel arbitration. Although the trial court apparently did not enter a formal order denying ATTM's motion to compel arbitration, its order denying class certification necessarily constituted a ruling denying the motion to compel based on a finding of waiver. ATTM did not file a protective cross-appeal as to the finding of waiver—although it ineffectually purports to reserve the right to appeal the ruling—and does not argue that the finding was incorrect. Under these circumstances, ATTM has forfeited the opportunity to challenge that finding. We presume that the ruling was correct and need not discuss its merits.

## II. The Trial Court Erred in Concluding the Waiver Did Not Apply to Putative Class Members

Given that ATTM waived its right to arbitrate against the named plaintiffs, we next consider whether the trial court was correct in concluding that such waiver did not apply to the putative class members. ATTM cites various reasons why the trial court was correct. ATTM contends the trial court correctly concluded that a motion to compel arbitration as to putative class members would be premature until a motion for class certification was filed. ATTM also asserts that prior to class certification, putative class members cannot be bound by precertification rulings on substantive issues. In addition, ATTM argues that it would violate the due process rights of putative class members to bind them to a precertification ruling. As we now discuss, we find none of these arguments persuasive.

*A. ATTM's Motion to Compel Arbitration Was Not Premature as to the Putative Class Members Unless and Until a Motion for Class Certification Was Filed*

ATTM asserts that the trial court correctly ruled, relying on *Sky Sports, supra*, 201 Cal.App.4th 1363, that ATTM's waiver of the right to compel arbitration did not apply to putative class members because any motion to compel arbitration as to those "nonparties" would be premature until a motion for class certification was filed. We conclude that *Sky Sports* did not so hold and that the trial court's ruling was legally incorrect. As this is a legal issue, our review is de novo. (*Id.* at p. 1367, citing *Lee v. Southern California University for Professional Studies* (2007) 148 Cal.App.4th 782, 785 (*Lee*).)

In *Sky Sports*, employees of defendant company filed a class action lawsuit seeking remedies for alleged rest break violations. In order to defeat class certification, about eight months after the motion to certify the class was filed the company argued that the majority of its employees had signed arbitration agreements as part of their employment contracts.[2] However, the putative class representative, Hector Hogan, had not signed such an agreement. The company therefore asserted that he was not an adequate class representative. The company demonstrated that a high percentage of the putative class members had signed arbitration agreements. Nonetheless, the trial court granted the class certification motion, finding that the company had waived its right to arbitration due to its unreasonable delay in bringing its petition to compel. (*Sky Sports*, *supra*, 201 Cal.App.4th at pp. 1366-1367.)

The Court of Appeal stated that it was called upon to determine if the trial court had erred in ruling that the company had waived its right to enforce the arbitration agreements by not moving to compel arbitration before certification of a class that included parties to the agreement. (*Sky Sports, supra*, 201 Cal.App.4th at p. 1367.) The appellate court concluded that the statutory pleading requirements to compel arbitration under Code of Civil Procedure section 1281.2 were not satisfied until the class was

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[2] In its answer to the complaint the company raised the existence of the arbitration agreements as an affirmative defense.

certified, and therefore any purported delay in bringing the motion to compel arbitration did not constitute a waiver. (*Id.* at p. 1365.) The court specified that the question before it was whether "a 'motion to compel the named plaintiff Hector Hogan to arbitrate before a ruling on the class certification motion would have been premature *because Hogan was not a party to an arbitration agreement*.'" (*Id.* at p. 1367, italics added.) "[W]e must determine if the company waived its right to compel arbitration because it did not bring the motion before certification of a class *that included parties to the arbitration agreement*." (*Ibid.*, italics added.)

The court reasoned as follows. "Section 1281.2 sets forth the procedure to compel arbitration of parties to an arbitration agreement. 'On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy . . . unless . . . [¶] (a) The right to compel arbitration has been waived by the petitioner[.]' (§ 1281.2.)

". . . . . .

"Arbitration is a matter of contract, and ordinarily someone not a party to an arbitration agreement cannot be compelled to arbitrate. (§ 1281.) The company contends none of the limited exceptions to compel a nonsignatory to arbitration apply here, and until the class was certified *to include a signatory to the arbitration agreement*, it would have been premature to bring a motion to compel. Section 1281.2 supports the company's position.

"To compel arbitration under section 1281.2, there must be a 'written agreement to arbitrate a controversy,' and a 'party thereto refuses to arbitrate such controversy.' As construed in *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, '[t]he Legislature plainly intended section 1281.2 to provide a procedural device for enforcing the parties' written arbitration agreement if one or more of the parties would not agree to such arbitration.' (*Id.* at p. 641.) Thus, to bring a motion to compel arbitration, a party must plead and prove: '(1) the parties' written agreement to arbitrate a controversy . . . ; (2) a request or demand by one party to the other party or parties for arbitration of such

controversy *pursuant to and under the terms of their written arbitration agreement*; and (3) the refusal of the other party or parties to arbitrate such controversy *pursuant to and under the terms of their written arbitration agreement*.' (*Ibid*., citation omitted.)

"The company could not bring a motion to compel Hogan to arbitrate because he was not a party to the company's arbitration agreement. (§ 1281.2.) The company also could not compel Hogan to arbitrate merely because the complaint defined the class to include employees who had signed arbitration agreements. (*Lee, supra,* 148 Cal.App.4th at pp. 786-787)." (*Sky Sports, supra,* 201 Cal.App.4th at pp. 1367-1368, fn. omitted.) "Up until Hogan brought the class certification motion, he could have narrowed the class to include only those employees who did not sign arbitration agreements. When he moved to represent a class, some of whom had signed arbitration agreements, the company opposed class certification by raising the arbitration issue to show Hogan's claims were not typical of the class he sought to represent." (*Id.* at p. 1369.) "We assume that had the company brought a motion to compel arbitration before class certification, the trial court would have denied the motion *because Hogan was not a party to the arbitration agreement*. Thus, any delay in bringing the motion to compel arbitration until the class was certified *to include parties to the arbitration agreement* cannot constitute a waiver by the company. Until the class was certified, the pleading requirements to move to compel arbitration under section 1281.2 were not satisfied. (*Mansouri v. Superior Court, supra,* 181 Cal.App.4th at p. 641.)" (*Sky Sports, supra*, at p. 1369, italics added.)

Here, citing *Sky Sports*, the trial court ruled that ATTM could not have moved to compel arbitration of the putative class members' claims "before the issue of class certification was before the court." The court stated: "While [plaintiffs] seek[] to distinguish Sky Sports on the basis that [ATTM] could have moved to compel arbitration as to the entire class because the 'named plaintiffs and the putative class members here are all subject to the same arbitration agreement' (unlike the named plaintiff in Sky Sports who did not sign the arbitration agreement), this is a distinction without a difference. Sky Sports stands for the proposition that it is premature to bring a motion to

compel arbitration as to the putative class members unless and until a class certification motion is filed, and the failure to bring one before then cannot constitute a waiver, including any claim based on the statute of limitations. Delay as to the putative class can only happen after certification."

In fact, the distinction that ATTM could have moved to compel arbitration as to the entire class because the named plaintiffs and the putative class members are all subject to arbitration agreements is a critical difference. *Sky Sports* does not "stand[] for the proposition that it is premature to bring a motion to compel arbitration as to the putative class members unless and until a class certification motion is filed." Instead, the appellate court held in essence that the trial court could not compel *anybody* to arbitrate until it had *somebody* before it who had signed the arbitration agreement, in that case by having the class defined, not simply alleged in the complaint, as including employees who had signed the arbitration agreement. The court did not hold that putative class members had to join in the action before the pleading requirements would be met to file a motion to compel; rather the class had to be defined as including signatories to the arbitration agreement because until then the class could possibly be defined to include only those employees who had not signed the arbitration agreement, so arbitration never would have become an issue. In contrast here, from the outset all plaintiffs—named and potential—were signatories to the arbitration agreement, and the class was always contemplated as including those who were subject to the arbitration agreement. Waiver of the right to arbitrate was based on ATTM's delay in renewing its motion to compel after *Concepcion*, and such conduct constituting waiver applied equally to all named plaintiffs and putative class members.

*Sky Sports* held that there could not be a waiver until someone subject to arbitration was involved; here there was always someone subject to arbitration involved until ATTM waived its right to compel arbitration. As declared in *Sky Sports*, "[T]o bring a motion to compel arbitration, a party must plead and prove: '(1) the parties' written agreement to arbitrate a controversy . . . ; (2) a request or demand by one party to the other party or parties for arbitration of such controversy *pursuant to and under the*

*terms of their written arbitration agreement*; and (3) the refusal of the other party or parties to arbitrate such controversy *pursuant to and under the terms of their written arbitration agreement*.'" (*Sky Sports, supra*, 201 Cal.App.4th at p. 1368, citing *Mansouri v. Superior Court, supra*, 181 Cal.App.4th at p. 641.) In this case, each of those requirements was met when the named plaintiffs refused to agree to individual arbitration pursuant to the terms of the written arbitration agreement that was contained in the consumer contract of adhesion received with each customer's Sony Ericsson T68i phones for use on ATTM's wireless network. Under these circumstances, the time was ripe for ATTM to move to compel arbitration as to the named plaintiffs and the putative class members when *Concepcion* was decided.

We stress that our conclusion—that ATTM waived its right to compel arbitration as to the named plaintiffs and all putative class members—is appropriate under the circumstances here because the putative class members are readily definable (purchasers of T68i phones), limited in time and not prospective (because as of 2004 the phones were no longer being sold), and all were at least potentially subject to arbitration agreements (aside from individual claims of lack of enforceability). ATTM is not being held to have waived a right to compel arbitration in perpetuity against unknown putative class members who do not yet exist. ATTM's waiver of its right to compel arbitration due to its delay eliminated any issues regarding enforcement of putative class members' arbitration agreements or regarding which arbitration language applies to each putative class member. Those issues were in fact ripe for decision up until the time ATTM was found to have waived its right to compel arbitration.

In its briefing on appeal, ATTM adopts the erroneous interpretation of *Sky Sports* relied upon by the trial court but goes much further, mischaracterizing both the holding in *Sky Sports* and the trial court's reasoning. It repeatedly states that putative class members are "nonparties" who have not yet asserted claims against ATTM, and that "[a]s a matter of law, putative class members are not yet parties to the litigation . . . ." It asserts as to the putative class members that "[t]hose nonparties are not before the court and have not raised any controversies with ATTM, so ATTM could not request arbitration of their

nonexistent claims, nor could they refuse to arbitrate," and that "[w]hat mattered [in *Sky Sports*] was that most of the putative class members were bound by arbitration agreements, and that before a class was certified they were not parties."[3] Not once in *Sky Sports* did the court hold or even suggest that putative class members are "nonparties" or "not before the court." Its holding was premised on the fact that at the time at issue it remained uncertain if *anyone*, whether a putative class member or not, who was a party to an arbitration agreement with defendant was definitively involved in the case. Similarly here, our focus is not on determining whether putative class members are parties or "nonparties." Our focus is on whether the statutory requirements for bringing a motion to compel were met (they were), whether ATTM should be held to have waived its right to compel arbitration as to both named plaintiffs and putative class members (they should), and whether our decision serves the purposes and goals of class action litigation, as well as those of arbitration (as we explain, it does).

"Often, courts and commentators will determine the rights and duties of absent class members by analyzing whether they should be considered 'parties' for purposes of the requirement, procedure, or rule involved. This focus of party status of absent class members is only of limited value because it begs the underlying issue concerning whether

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**3** In support of this proposition, other than its erroneous reliance on *Sky Sports*, ATTM merely cites in a footnote two nonpublished federal cases: *In re TFT-LCD* (*Flat Panel*) *Antitrust Litigation* (N.D.Cal. 2011) 2011 WL 1753784 (*TFT-LCD*), and *Laguna v. Coverall North America, Inc.* (S.D.Cal. 2011) 2011 WL 3176469.

In *TFT-LCD*, for example, in finding waiver of the defendant's right to compel arbitration as to named plaintiffs but not putative class members, the district court stated that putative class members are not parties to an action prior to class certification. Suffice it to say that we disagree with the reasoning of the court in *TFT-LCD*. Analyzing this issue simply by categorizing putative class members as nonparties, rather than by focusing on the policies behind class litigation, is flawed. In addition, as ATTM points out, this state's Code of Civil Procedure, and our interpretation of its requirements, govern the procedure for invoking arbitration in California courts (unless the Federal Arbitration Act [FAA] preempts the Code's provisions, which is not the case here). As we have concluded, the requirements for ATTM to be entitled to bring a motion to compel arbitration as to the named plaintiffs and the putative class members were met here prior to the filing of plaintiffs' motion for class certification.

the procedure or rule applies to persons who are not physically before the court, who are not named and identified parties to the suit, and who are interested or involved solely because they share a common issue in controversy with a named party, and the court has determined that the named party will adequately represent their interests. As Justice Powell suggested in his dissenting opinion in *Deposit Guaranty National Bank v. Roper* [(1980) 445 U.S. 326], the courts risk confusion and uncertainty when they try to determine the implications of rights of the representative or of class members by focusing on whether absent members are parties or are present as parties for some purposes and not for others. The position that absent class members occupy in class action litigation is *sui generis*, and attempts to analogize to conventional 'party' status are likely to fail. It is more logical for a court faced with a question concerning the rights and duties of absent class members to analyze the issue presented with reference to the goals of representative litigation, not by strained analogies to conventional litigation." (1 Conte et al., Newberg on Class Actions (5th ed. 2011) § 1:5, pp. 15-16, fns. omitted.)

We therefore examine the issue presented—the consequences of ATTM's delay in seeking to compel arbitration after *Concepcion* made classwide arbitration waivers permissible once again—with reference to the goals of class action litigation, and also with reference to the intended purposes of arbitration. More specifically, the critical focus here is on the defendant's conduct: ATTM's conduct in undertaking class-related discovery before moving to compel arbitration was manifestly incompatible with a desire to engage in arbitration as to the named plaintiffs *and* the putative class members.

### *B. Whether Putative Class Members Can Be Bound by Precertification Rulings on Substantive Matters Is Not the Proper Focus of Our Inquiry*

ATTM contends that "[i]t is well established that a favorable ruling for a defendant before class certification—when 'no other members of the class need be bound by the outcome, for they were not parties to the lawsuit and received no notification about it'—does not buy the defendant any peace because it does not preclude subsequent

lawsuits by other plaintiffs if a class is not certified. (Citing *Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006, 1011.)

Similarly, ATTM also cites the Supreme Court's decision in *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074 (*Fireside Bank*). There, the court stated: "A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 146 . . . ; Fed. Rules Civ.Proc., rule 23(c)(1)(A), 28 U.S.C.; *Hickey v. Duffy* (7th Cir. 1987) 827 F.2d 234, 237.) The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings. The rule stands as a barrier against the problem of 'one-way intervention,' whereby not-yet-bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones."[4] (*Fireside Bank*, *supra*, at p. 1074.)

These authorities have no relevance here. The ruling denying class certification now before us is neither a ruling in favor of defendant by which other members of the class need not be bound, nor is it a ruling on the substantive merits. The trial court's ruling would necessarily mean that no class action is available and all would-be class members would have to seek recourse on an individual basis. Denial of class certification and the finding of waiver by ATTM are procedural rulings only, not

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[4] Regarding the problem of "one-way intervention," the United States Supreme Court has held that "potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." (*Am. Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538, 549; see *Fireside Bank*, *supra*, 40 Cal.4th at p. 1079.)

substantive ones, because they simply determine the forum in which this dispute is going to be heard.

The circumstances of this case are unique. Our Supreme Court decided *Discover Bank* just before the trial court was to rule on ATTM's 2005 motion to compel individual arbitration, and held that class arbitration waivers were unconscionable and therefore unenforceable. Then, immediately after ATTM filed its answer to the operative third amended complaint, the United States Supreme Court ruled in *Concepcion* that the *Discover Bank* holding is preempted by the FAA. While it is true that ATTM manifested a desire to proceed by way of individual arbitration early in the litigation, its ability to do so was thwarted by *Discover Bank*. Yet when *Concepcion* revived its ability to compel individual arbitration, ATTM waited over six months to renew its motion.[5] Instead, it engaged the named plaintiffs in discovery. Such conduct is plainly inconsistent with a desire to arbitrate. The trial court recognized that fact in finding that ATTM had waived its right to compel arbitration. The court abused its discretion, however, in finding that "other than [ATTM's] failure to plead the affirmative defense of arbitration, there are no other factors showing that [ATTM] intended to waive its right to compel arbitration *as to the remaining putative class members*." (Italics added.) (The court cited *Sky Sports*, indicating its erroneous belief that ATTM could not move to compel arbitration against putative class members until a motion for class certification was filed.) Engaging in class-related discovery is clearly inconsistent with an intent to arbitrate. ATTM perhaps did so in hopes of *defeating* class certification, but nonetheless it participated in the litigation, and did so on the plaintiffs' terms, i.e., a putative class action. Its waiver of the right to compel arbitration was applicable to the putative class as a whole, as well as the named plaintiffs. *ATTM's conduct is the correct focus here*, not whether putative class

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[5] Apparently after *Concepcion* was decided ATTM sought the court's permission to file a motion to strike the class allegations. The court refused to permit ATTM to do so. ATTM did not seek writ review of that ruling. Instead, it proceeded to conduct discovery.

members are parties to the action, and not whether putative class members are bound by or may benefit from precertification rulings.

Affirming the trial court's denial of class certification would eliminate the class members' opportunity to pursue these claims as a class action. Further, ATTM's delay in asserting its right to arbitrate has resulted in the expenditure of considerable costs by plaintiffs and would-be class counsel in litigating this case and conducting discovery. Forcing the named plaintiffs to litigate alone now, and forcing the class to arbitrate individually, would result in those costs being wasted. In short, there is no question that plaintiffs have relied to their detriment on ATTM's failure to assert its right to arbitration in a timely manner. If the trial court's ruling were upheld, ATTM would *benefit* from its delay in invoking arbitration by making it impractical for the plaintiffs to proceed with the litigation and, ironically, by *forcing* the erstwhile putative class members to pursue arbitration if they wish to have their dispute heard. The putative class members have up until this point been permitted to rely on the named plaintiffs to press their claims (see *Crown v. Parker* (1983) 462 U.S. 345, 350), so the named plaintiffs' reliance on ATTM's conduct in failing to assert its right to arbitration in a timely manner would result in prejudice to the entire class if the trial court's ruling were permitted to stand. The purpose of arbitration is to provide a quick, efficient, less expensive form of dispute resolution. Upholding the trial court's ruling would instead reward ATTM for its delay and allow arbitration to occur after plaintiffs have already expended significant monetary and other resources. It would also defeat the goal of class action litigation to provide an opportunity for numerous individual claims involving small amounts of damages to be tried together in an efficient manner.

ATTM contends that it would violate the due process rights of putative class members if they were to be bound by the actions of the named plaintiffs and their attorneys, and the court's rulings, without first giving them notice and an opportunity to opt out. ATTM's claim is without merit. Under our ruling finding that ATTM waived its right to compel arbitration as to everybody, and assuming the class were to be certified, the putative class members would still have the ability to opt out of the class litigation

and choose to individually arbitrate instead. Their opportunity to do so is not foreclosed. Again, the focus of our inquiry and concern is on whether ATTM is fundamentally bound by its conduct constituting waiver and acquiescence to participate in litigation, not on whether putative class members are bound by rulings made before a class is certified. We conclude that ATTM is indeed bound by its waiver as to all members of the putative class.

## DISPOSITION

The order denying class certification is reversed and the matter is remanded to the trial court for further consideration in keeping with the views expressed in this opinion. Plaintiffs are awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.